

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ADEL AHMED	:	ORDER
	:	DTA NO. 819079
for Redetermination of a Deficiency or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for the	:	
Period Ended 10/31/00.	:	

Petitioner, Adel Ahmed, 265 East 182nd Street, Apt. # One, Bronx, New York 10457, filed a petition for redetermination of a deficiency or for refund of cigarette tax under Article 20 of the Tax Law for the period ended 10/31/00.

A small claims hearing was scheduled before Presiding Officer James Hoefer at the Manhattan District Office, New York State Department of Taxation and Finance, 1740 Broadway, 16th Floor, New York, New York 10019 on Thursday January 22, 2004 at 10:45 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request received February 23, 2004 that the default determination be vacated. The Division of Taxation did not oppose petitioner's application to vacate the default.

Petitioner, Adel Ahmed, appeared on his own behalf.

Upon a review of the entire case file in this matter as well as the arguments presented for the request that the default determination be vacated, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

FINDINGS OF FACT

1. On July 17, 2002, the Division of Tax Appeals received a petition from Mr. Adel Ahmed protesting an assessment of cigarette tax issued under Article 20 of the Tax Law. The assessment, Notice of Determination Number L-019419457, dated May 14, 2001, imposed a penalty of \$8,600.00 for being in possession of unstamped or unlawfully stamped cigarettes.

2. On December 15, 2003, the assistant calendar clerk of the Division of Tax Appeals sent a Notice of Small Claims Hearing to petitioner and to the Office of Counsel of the Division of Taxation advising them that a hearing had been scheduled for them on Thursday, January 22, 2004 at 10:45 A.M. at the New York State Department of Taxation and Finance, Manhattan District Office, 1740 Broadway, New York, New York 10019.

3. On January 22, 2004 at 10:45 A.M., Presiding Officer James Hoefer called the ***Matter of Adel Ahmed***, involving the petition here at issue. Present was the representative for the Division of Taxation. Petitioner did not appear and no representative appeared on his behalf. The representative for the Division of Taxation moved that petitioner be held in default. On February 6, 2004, Presiding Officer Hoefer issued a determination finding petitioner in default.

4. On February 23, 2004 the Division of Tax Appeals received petitioner's request to vacate the default. In his request, petitioner stated that he had never received the Notice of Small Claims Hearing and had missed his hearing for that reason. He explained that his mail box was broken into on numerous occasions with the result that he often did not receive his mail. To demonstrate that he has a meritorious case, petitioner has submitted certificates of disposition from the Criminal Court of the City of New York which indicate that the criminal aspects of this matter were resolved by a dismissal of the charges against him due to a failure to prosecute.

5. On February 27, 2004, a copy of petitioner's application to vacate was sent to the Division of Taxation. The Division was given 30 days to respond to the application to vacate the default. The Division of Taxation did not oppose the application.

6. The case file in the instant matter contains a series of letters from petitioner indicating his desire to have a hearing and to resolve the disputed tax assessment.

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, "In the event a party or the party's representative does not appear at a scheduled hearing and an adjournment has not been granted, the presiding officer shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear." (20 NYCRR 3000.13[d][2].) The rules further provide that: "Upon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case." (20 NYCRR 3000.13[d][3].)

B. There is no doubt based upon the record presented in this matter that petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the presiding officer correctly granted the Division's motion for default pursuant to 20 NYCRR 3000.13(d)(2) (*see, Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995; *Matter of Morano's Jewelers of Fifth Avenue*, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioner to show a valid excuse for not attending the hearing and to show that he had a meritorious case (20 NYCRR 3000.13[d][3]; *see also, Matter of Zavalla, supra; Matter of Morano's Jewelers of Fifth Avenue, supra*).

C. Petitioner's explanation has established reasonable cause for his failure to appear at his hearing. The mere denial of receipt of a properly mailed hearing notice is not reasonable cause

for failure to appear at a hearing. If it were, everyone could merely deny receipt of the hearing notice in order to vacate a default. However, in the instant matter, petitioner's stream of letters indicates a continuing effort to obtain a hearing. This effort is inconsistent with someone intentionally defaulting at hearing. Accordingly, I find that petitioner has established reasonable cause for his failure to appear at his hearing.

D. All criminal charges against petitioner were dismissed for failure to prosecute. In addition, the Division of Taxation has not opposed petitioner's request to vacate the default. These circumstances, while not dispositive, lead me to conclude that there may be some merit to petitioner's case. Accordingly, I find that petitioner has met his burden of establishing that he has a meritorious case and that the default determination should be vacated.

E. It is ordered that the request to vacate the default order be, and it is hereby, granted and the Default Determination issued February 6, 2004 is vacated and a new hearing will be scheduled as soon as is practical.

DATED: Troy, New York
May 20, 2004

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE